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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CATHERINE CORNELL,
Appellant,

v. Vet.App. No. 15-3191

ROBERT A. MCDONALD,
Secretary for Veterans Affairs,
Appellee.

BOBBY S. MOBERLY,
Intervenor.

MS. CORNELL'S SUPPLEMENTAL BRIEF

The VA's September 20, 2016 *Solze* letter in combination with the VA's payment to Mr. Moberly of the monies withheld from his award of past due benefits eliminated any remaining case or controversy in Mr. Moberly's appeal of the VA's May 2012 fee decision. Further Ms. Cornell's appeal of the VA's decisions concerning whether she was required to settle a debt with Mr. Moberly or whether the VA's payment of $20,204.16 to Ms. Cornell as attorney fees was proper has been rendered moot. Ms. Cornell submits the following memorandum of law to assist the Court in its consideration of the appropriate disposition of this appeal.

I. Ms. Cornell's appeals.

Ms. Cornell initiated two appeals. The first appeal was on January 16, 2013 when she filed a notice of disagreement with the VA's letter of December 3, 2012, which unlawfully created a debt of $ 20,204.16. RBA 219-226. The second appeal was on February 8, 2013 when she filed a notice of disagreement with the VA's February 2013 administrative decision. RBA RBA 201-210. On August 4, 2014, Ms. Cornell filed a petition for extraordinary relief with the United States Court of Appeals for Veterans Claims to compel the VA to submit to her a statement of the case so that she could obtain both administrative and, if necessary, judicial review of the VA's unlawful actions in creating a debt of $ 20,304.16. *See* Vet App No. 14-2559. Ms. Cornell waited until August of 2014 for the VA to submit a statement of the case. Ms. Cornell completed both of her appeals. Both of her appeals were mooted by the VA's May 2015 decision to pay Mr. Moberly the sum of $20,304.16. RBA 54.

Though this Court is an Article I Court, it has adopted the case-or-controversy requirements of Article III courts. *See Mokal v. Derwinski*, 1 Vet.App. 12 (1990). The Supreme Court has interpreted this requirement to demand that "an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U. S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U. S. 395, 401 (1975)). The VA's actions of May 2015 paying Mr.

Moberly the sum of $20,304.16 extinguished any actual controversy because the propriety of the VA's payment to Ms. Cornell is no longer material.

II: Mr. Moberly's pending appeal.

Inextricably intertwined in Ms. Cornell's appeals is Mr. Moberly's appeal of the VA's May 2012 fee decision based on the notice of disagreement filed by his representative, Disabled American Veterans(DAV). RBA 231. The VA's September 20, 2016 *Solze* letter confirms that the VA failed to notify Mr. Moberly's representative of its May 2012 decision contrary to the requirements of 38 U.S.C. § 5104(a); 38 C.F.R. § 3.103(b), (f). As a consequence, Mr. Moberly's appeal remains pending. This Court's decision in *Matthews v. Principi*, 19 Vet. App. 23 (2005) holding that any defect in mailing by the VA was cured by the actual knowledge of the veteran's representative has either been implicitly overruled or does not apply in this case based on the Federal Circuit's decision in *Carter v. McDonald*, 794 F. 3d 1342 (2015). The decision in *Carter* observed that:

> In *Matthews*, the [Veterans] court held that an attorney's receipt of a Statement of the Case contained in a response to a request for a veteran's claim file (under specific circumstances not present here) constituted the required mailing, which then started the clock for filing [actually the completion of] an appeal. *Id.* at 29. The ruling that the particular clock restarted in that context did not provide Mr. Carter's counsel clear notice that the clock restarted in the present context, contrary to the clear deadline in the Board letter.

Carter, 794 F. 3d 1346. The Federal Circuit's decision in *Carter* relied upon the provisions of a VA regulation which provides:

> **Any person holding power of attorney**, a recognized attorney who has filed the requisite declaration, **or the accredited representative of a recognized organization holding power of attorney shall be supplied with a copy of each notice to the claimant respecting the adjudication of the claim**. If a claimant dies before action on the claim is completed, the person or organization holding power of attorney or the attorney who has filed the requisite declaration may continue to act until the action is completed except where the power of attorney or requisite declaration was filed on behalf of a dependent.

38 C.F.R. § 1.525(d). (emphases added). Relying on this regulatory provision the Federal Circuit concluded:

> **That regulatory requirement of notice can only sensibly be construed to require that the notice to counsel be timely, which requires, at a minimum, notice before the expressly stated deadline has passed**. We could hardly interpret the notice requirement any differently given the nature of "notice." See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *In re Smith*, 582 F.3d 767, 780 (7th Cir.2009) (notice must come sufficiently in advance of a critical deadline to give the affected party "a reasonable opportunity to take appropriate action before the deadline . . . passe[s]"); *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1112 (D.C. Cir.1985) (notice must be given "before a hearing if there is to be a meaningful opportunity to respond"); *Bell v. Parkway Mortg.*,

> Inc. (*In re Bell*), 309 B.R. 139, 157 (Bankr.E.D.Pa.2004) (notice of a borrower's right to rescind a loan, received after the rescission deadline expired, was "meaningless"); 32 Wright & Koch, Fed. Prac. & Proc.: Judicial Review § 8222 (1st ed. 2006) ("Fairness ... requires that the notice be given sufficiently prior to the adjudication so as to allow the party to adequately participate."). The government cites no authority to the contrary. And the Board undisputedly failed to meet the pre-deadline-notification requirement.

Carter, 794 F. 3d 1345. (emphasis added). Thus, the holding of the Federal Circuit in *Carter* controls and requires a legal determination by this Court that Mr. Moberly's appeal was pending until the VA paid Mr. Moberly amount it withheld from his award of past due benefits. Further, this the question is not controlled by this Court's decision in *Matthews*.

There are important factual differences between this matter and the circumstances in *Matthews*. The circumstances in *Matthews* were that the VA failed to provide notice to Mr. Matthews's representative of the VA's issuance of a statement of the case notifying Mr. Matthew's of when the clock started for the completion of the appeal initiated under the provisions of 38 U.S.C. § 7105. The circumstances in *Carter* were that the Board failed to provide notice to Mr. Cater's representative of when the clock started for Mr. Carter's submission of additional argument and evidence following remand from this Court. The circumstances in this case are that the VA failed to provide notice to Mr. Moberly's representative concerning when the

clock started for a simultaneously contested claim under the provisions of 38 U.S.C. § 7105A.

In light of the Federal Circuit's conclusion in *Carter* that this Court had "legally erred in finding a cure of the notice defect," *Carter*, 794 F. 3d 1347, Mr. Moberly's appeal of the VA's May 2012 fee decision remained pending **until** the VA in May 2015 paid Mr. Moberly the sum of $20,304.16. This payment by the VA extinguished any actual controversy because such payment to Mr. Moberly satisfied any interest Mr. Moberly may have had in his pending appeal of the VA's May 2012 fee decision. As a result of the VA payment to Mr. Moberly he has no further interest in either Ms. Cornell's appeal or in his appeal of the VA's May 2012 decision.

III: Both Mr. Moberly's appeal as well as Ms. Cornell's appeals concern a simultaneously contested claim.

In order for this Court to correctly dispose of Ms. Cornell's appeals it must recognize that whether considering Ms. Cornell's appeals or Mr. Moberly's pending appeal both appeals involve the same issue which is a simultaneously contested claim over the monies withheld from Mr. Moberly's award of past due benefits. This Court can have no doubt that the record before the agency confirms that the VA has now, rightly or wrongly paid those finds to both Mr. Moberly and Ms. Cornell. Therefore, understanding the process for a simultaneously contested claim is required.

In *Cox v. West*, 149 F.3d 1360, 1365 (Fed. Cir.1998), the Federal Circuit held

that a VA decision denying the payment of a fee from a veteran's award of past due benefits is an appealable issue to the Board of Veterans Appeals. Equally, the VA's finding that a fee agreement is valid and the withholding and the payment of an attorney fee is required from a veteran's award of past due benefits is an appealable issue to the Board of Veterans Appeals. In this case there is no doubt that Mr. Moberly sought to appeal the VA's May 8, 2012 decision, RBA 234, which found that his fee agreement with Ms. Cornell was valid and that the VA was required to withhold and pay to her the fee called for in the fee agreement with Mr. Moberly.

In *Mason v. Shinseki*, 743 F.3d 1370 (2014), the Federal Circuit concluded that the language of 38 U.S.C. § 7105 and 38 U.S.C. § 7105A provided no reason or any basis upon which to distinguish between the applicability of either of these provisions of law to a VA decision concerning a determination regarding the validity of a fee agreement between the veteran and the attorney under the provisions of 38 U.S.C. § 5904(d)(2) to require the VA to withhold and pay the fee called for in a fee agreement to the attorney. The Federal Circuit concluded in *Mason* that the VA's interpretation of 38 C.F.R. § 20.3(p) controls, and held that denials of direct-fee requests made pursuant to § 5904(d) were subject to the sixty-day notice of disagreement period prescribed by § 7105A(a). *Mason*, 743 F.3d 1376.

Based on the VA's regulatory definition of a simultaneously contested claim,

Mr. Moberly's notice of disagreement was the initiation of an appeal of the VA's May 8, 2012 decision. As noted above, Mr. Moberly's appeal remained pending **until** the VA in May 2015 paid Mr. Moberly the sum of $20,304.16 which terminated that appeal because there was no remaining controversy.

IV. Understanding what was actually decided by the VA's May 8, 2012 decision.

As noted in the preceding section, the VA by regulation has defined a simultaneously contested claim. In accordance with § 20.3(p), a simultaneously contested claim refers to the situation in which the allowance of one claim results in the disallowance of another claim involving the same benefit or the allowance of one claim results in the payment of a lesser benefit to another claimant. In this matter, the "claim" at issue was the $ 20, 304.16 withheld from Mr. Moberly's award of past due benefits and paid to Ms. Cornell pursuant to the fee agreement of the parties. However, the fact that the VA considers this to be a "claim" does not permit the VA to disregard what was actually determined by the VA's May 8, 2012 decision which was:

> A valid fee agreement was properly filed in the above-cited case by an accredited attorney or agent, and $2030416 (sic) was withheld from the rating decision dated May 4, 2012 for possible payment of fees. The notice of disagreement (NOD), with an agency of original jurisdiction decision was filed on or after June 20, 2007.

RBA 247. The criteria used by the VA was described as follows:

> **Requirements for direct payment of fees**
>
> Per 38 C.F.R. § 14.636, all the following requirements must be met for direct payment of fees:
>
> - the total fee payable cannot exceed 20 percent.
> - the fee must be contingent on a favorable outcome.
> - the award of past-due benefits must result in a cash payment to the claimant.
> - the accredited attorney or agent performed services after the NOD was filed.

Id. Thus, the actual decision made by the VA in its May 8, 2012 decision was whether or not there was a valid fee agreement between Mr. Moberly and Ms. Cornell which required the VA to withhold the amount of the fee called for in their fee agreement and pay the agreed upon fee to Ms. Cornell. These requirements are based on the statutory provisions of 38 U.S.C. § 5904(d). Neither the statute nor the VA's regulation calls for or requires a determination that the attorney is "entitled" to a fee other than the fee called for in the fee agreement between the veteran and his attorney.

This assertion is confirmed by the VA's description in its May 8, 2012 decision of what the VA "granted" which was: "All conditions listed above are met, and the attorney or agent is found to be eligible for a direct payment of fees by VA of $20304.16." RBA 247. The VA's May 8, 2012 decision is clear and unambiguous. It found Ms. Cornell to be "eligible" for direct payment by the VA of $ 20, 304.16 because that was the amount of the fee called for in her fee agreement with Mr.

Moberly. The VA's May 8, 2012 decision **did not** make a determination that Ms. Cornell was "entitled" to any fee other than the fee called for in her fee agreement with Mr. Moberly. The determination by the VA was to confirm that a valid fee agreement existed and that the requirements for direct fee payment had been complied with pursuant to the terms of the fee agreement and the statutory and regulatory requirements.

It is incorrect and inaccurate to conclude that the VA's May 8, 2012 made an independent determination that the fee in this case was based on **any other criteria** than the requirements set out in 38 U.S.C. § 5904(d) and 38 C.F.R. § 14.636(h). In particular, the creation of a requirement that Ms. Cornell was Mr. Moberly's representative at the time that the VA made its award of past due benefits due to his entitlement to an extraschedular total rating due to his unemployability for the entire period of his claim.

The only explicit limitation imposed by Congress to be eligible for fee withholding by the VA and direct payment to the attorney is that: "the total fee payable to the agent or attorney **may not exceed 20 percent of the total amount of any past-due benefits awarded on the basis of the claim**." 38 U.S.C. § 5904(d)(1). The total amount of the past due benefits awarded Mr. Moberly by the VA "on the basis of the claim" for service connected compensation for his bilateral hearing loss and tinnitus included both the VA's schedular award as well as its

extraschedular award. Section 5904(d)(1) is unambiguous the total fee payable to the attorney "may not exceed 20 percent of the total amount of **any** past-due benefits awarded on the basis of the claim."

The statute does not impose any requirement that the attorney, as in the facts of this case, have filed the forms for an extraschedular total rating. The statute merely states that an attorney's total fee may not exceed 20 percent of the total amount of **any** past-due benefits awarded on the basis of the claim. That is precisely what the VA's May 8, 2012 decision determined. This determination by the VA is not the same as a review for the reasonableness of the fee called for in a fee agreement. The review for reasonableness is addressed in the section below.

V. The provisions of 38 C.F.R. § 14.636(i).

It is critical to understand that there exists a separate process for reviewing a fee agreement for the amount of the fee called for in the fee agreement between a veteran and an attorney. Congress initially directed that the Board of Veterans Appeals would have *sua sponte* authority to review a fee agreement for reasonableness under the prior version of 38 U.S.C. § 5904(c). In December 2005, Congress amended the statute redirecting the authority to fee agreements for reasonableness. *See* 38 U.S.C. § 5904(c)(3)(A). Congress explicitly gave the Secretary the authority to order a reduction in the fee called for in the agreement if the Secretary were to find that the fee is excessive or unreasonable. The Secretary delegated that responsibility

to the Office of the VA's General Counsel. *See* 38 C.F.R. § 14.636(i).

Prior to December of 2005, the VA had promulgated regulations for such review by the Board at 38 C.F.R. § 20.609(i). Following Congress's amendment shifting the responsibility for reviews for reasonableness from the Board to the Secretary, the VA renumbered and adjusted the former regulations to § 14.636(i). In *Scates v. Gober*, this Court held that "all issues involving entitlement or eligibility for attorney fees under direct-payment contingency-fee agreements, as contrasted with the issues of reasonableness and excessiveness, must first be addressed by the RO in accordance with the normal adjudication procedures." 14 Vet. App. 62, 64 (2000) (*en banc*). It is the scope of the issues of eligibility as opposed to the scope of the issues of reasonableness which controls the result in this appeal but also informs this Court concerning the limitations on the former as compared to the later.

Under the provisions of § 14.636(i) concerning a review of the fee called for in the fee agreement for reasonableness, claimants as well as attorneys and agents are given specific guidance as opposed to the absence of such guidance for reviews for eligibility. For example, under § 14.636(i) a written motion for review for reasonableness is required. Such motions must be filed before the expiration of 120 days from the date of the final VA action, the Office of the General Counsel may review a fee agreement between a claimant or appellant and an agent or attorney upon its own motion or upon the motion of the claimant or appellant. Further, the

motion must be served on the attorney or agent and the Office of the General Counsel. *See* 38 C.F.R. § 14.636(i)(1).

The VA's Office of the General Counsel may order a reduction in the fee called for in the agreement if it finds by a preponderance of the evidence, or by clear and convincing evidence in the case of a fee presumed reasonable under paragraph (f) of this section, that the fee is unreasonable. Further, the VA's Office of the General Counsel may approve a fee presumed unreasonable under § 14.636(f) if it finds by clear and convincing evidence that the fee is reasonable. In addition, § 14.636(i) provides that the VA's Office of the General Counsel's review of the agreement under this paragraph will address the issues of eligibility under § 14.636(c) and reasonableness under § 14.636(e). However, important to this matter, § 14.636(i) expressly provides that the VA's Office of the General Counsel will limit its review and decision under this paragraph to the issue of reasonableness if another agency of original jurisdiction has reviewed the agreement and made an eligibility determination under § 14.636(c).

Also relevant to this matter, motions for review of fee agreements must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran, and the applicable VA file number. In addition, such motions for reviews for reasonableness of the fee must set forth the reason, or reasons, why the fee called for in the agreement is unreasonable and must be

accompanied by all evidence the moving party desires to submit and be served upon the attorney and VA's Office of the General Counsel. Based on these regulatory requirements, Mr. Moberly's July 31, 2012 notice of disagreement cannot be construed or accepted as a request for review of the fee called for in his fee agreement with Ms. Cornell based on reasonableness.

The record in this case confirms that neither Mr. Moberly nor the VA's Office of the General Counsel made a motion for review for reasonableness. The record further confirms that the VA made an eligibility determination in its May 8, 2012. RBA 247 and 249. As a result, the VA's Office of the General Counsel would be limited in its review and decision under § 14.636(i) on the issue of reasonableness because another agency of original jurisdiction has reviewed the agreement and made an eligibility determination under § 14.636(c).

As indicated by Ms. Cornell's counsel at oral argument, there is a question as to whether the VA's Office of the General Counsel can make a motion under § 14.636(i) to review the fee agreement in this case. Because no such morion has been made that question is not before this panel. However, it should be evident that in order to address whether the VA's Office of the General Counsel can make a motion under § 14.636(i) to review the fee agreement in this case, an interpretation of the meaning of the phrase: "Before the expiration of 120 days from the date of the final VA action . . ." is required. Thus, the date of the VA's final action in this matter

must be May of 2015 when the VA paid Mr. Moberly the monies withheld by the VA from his award of past due benefits. This is the date of the VA's final action because the action of paying Mr. Moberly mooted his pending appeal of the VA's May 2012 decision. It is also noteworthy that no motion for review was filed by either Mr. Moberly or the VA's Office of the General Counsel before the expiration of 120 days as is unambiguously required by the plain language of § 14.636(i). In addition, the plain language § 14.636(i) indicates that the issue of reasonableness will be limited to that issue when as here there was another decision made by an agency of original jurisdiction which has reviewed the agreement and made an eligibility determination under § 14.636(c) as there was in this case.

CONCLUSION

This Court should find that as a result of the VA's May 2015 payment to Mr. Moberly of the monies withheld by the VA from his award of past due benefits, the VA has mooted Ms. Cornell's appeals. Further, this Court should find that as a result of the VA's May 2015 payment to Mr. Moberly of the monies withheld by the VA from his award of past due benefits, the VA has mooted his pending appeal. As such this Court lack subject matter jurisdiction to address the broader issue a simultaneously contested claim inherent in both Ms. Cornell's appeal as well as in Mr. Moberly's formerly pending appeal.

Wherefore, this Court should set aside the Board's decision based on the lack of a case or controversy and dismiss this appeal.

Respectfully submitted

/s/ Kenneth M. Carpenter
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Electronically filed on October 4, 2016